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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1968

No. 1055

DAVIE FRANKLIN WILSON,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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DAVIE FRANKLIN WILSON prays that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered in the above entitled matter on July 25, 1968 and becoming final on November 15, 1968, after petition for rehearing was denied.

I.
CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Washington is reported in 74 W.D.2d 244, July, 1968 and is attached hereto as Appendix A.

II.
JURISDICTION

The judgment of the Supreme Court of Washington

was entered on July 25, 1968. A petition for rehearing was timely filed. Rehearing was denied on November 15, 1968 and the judgment became final on November 15, 1968. The jurisdiction of the court is invoked under 28 U.S.C., Sec. 1257 (3) and Rule 22 (1).

III.

QUESTION PRESENTED

Whether an accused is denied his right of due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution when a state court forces him to waive his motion to dismiss if he testifies in his own defense.

IV.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution. Because of the length of these provisions they are printed verbatim in Appendix B hereto.

V.

STATEMENT

The petitioner was tried and convicted by a jury of burglary in the second degree. He was sentenced to 15 years in the Washington State Penitentiary.

The testimony indicated that the Harmony Apparel Shop at No. 3 Boston and the Salady Standard Drug Store at No. 1 Boston are separate, but adjoining stores in Seattle, Washington (St. 31).

On the 23rd day of January, 1967, there was a breaking

and entry of the Harmony Apparel Shop situated at No. 3 Boston Street (St. 34).

Nowhere in the record is there any evidence that anything was taken from the Harmony Apparel Shop at No. 3 Boston. The breaking of that particular store was through the entrance door and then on through a common wall between the Harmony Apparel Shop at No. 3 Boston and the Salady Drug Store at No. 1 Boston.

No narcotics were kept at the Harmony Apparel Shop (St. 36).

Sergeant Ammerman testified that when he arrived at the drug store he heard pounding on the walls and he witnessed the wall being broken through from the apparel shop to the drug store (St. 42). Officer Fitch also testified, concerning the petitioner, Davie Wilson, "I saw his head poke through the hole and then he was gone. I don't know where he went. The next time I saw him he was outside with Sergeant Ammerman." The police testimony established that the defendants were breaking and entering the drug store.

Sergeant Ammerman testified that when the petitioner, Davie Wilson, came out of the front door of the apparel shop and was apprehended, the petitioner said, "Don't shoot. You won't have any need for that." The sergeant further testified that as he placed him against the window Davie Wilson said, "I just had to get some narcotics" (St. 43).

Both defendants were caught by the police just after they had gained entrance to the drug store. They did not have time to obtain any narcotics as originally was their intent.

The prosecutor recognized what the facts of the case showed and in argument said the following: "The state established an intent and Officer Ammerman testified to the comment Mr. Wilson made, something about getting the narcotics. That was the intent. That was what he was doing in that building" (St. 110).

Later in his argument the prosecutor said again, "Also, you have the intent to commit a crime therein. What was the intent? Narcotics."

Thus the prosecutor indicated what the evidence had established clearly, i.e., that the petitioner broke into the building with intent to commit the crime of stealing narcotics from the drug store. The direct evidence, the circumstantial evidence, the admission of the petitioner, Davie Wilson, all show beyond any doubt that the intent was to steal narcotics from the drug store, not to take anything from the apparel shop.

At the end of the state's case the defendant moved to dismiss on the grounds that the prosecutor had charged burglary of the apparel shop when the charge should have been burglary of the drug store. The facts and the evidence which had been presented showed that there was no intent on the part of the defendant to take any merchandise from the apparel shop. A basic element of the crime of burglary requires that the state prove that the defendant had the intent to commit a crime in the building broken. It was obvious that the defendant was simply using the apparel shop as a passage to the drug store.

The motion of the defendant was denied and he was then faced with the dilemma of proceeding with his

defense by testimony or standing on his motion. He chose to present testimony. The Washington State Supreme Court said in its written opinion that the defendant waived his motion to dismiss by proceeding with his defense. *State v. Wilson,* 74 W.D.2d 244, ...P.2d.... (1968).

VI.

REASONS FOR GRANTING WRIT

In the State of Washington a defendant who fails to stand on his motion to dismiss, made and denied when the state rests its case, and who thereafter testifies in his own behalf, waives his motion to dismiss. *State v. Mudge,* 69 Wn.2d 861, 862, 420 P.2d 863 (1966); *State v. Wilson, supra.* The court in this case reaffirms the general rule of waiver which has been applied at least ten times in the past in Washington and says that the only exception is when the evidence presented by the defendant has no bearing on the merits of the cause. *State v. Wilson, supra* 249, *State v. Brown,* 178 Wash. 588, 35 P.2d 99 (1934). It is submitted that there would be very few instances when testimony by the defense would have no bearing whatsoever on the merits of the case.

It is true that Davie Wilson testified to the facts which he remembered. He believed that he had a basic right to present his side of the case without being prejudiced procedurally. Every defendant, under the United States Constitution, is entitled to due process of law, a chance to testify, and the fairest trial possible. The rule existing in Washington saying that a defendant in a criminal trial waives his prior motion to dismiss once he has testified in his own behalf is prejudicial and a denial of a de-

fendant's right to due process of law. Logic requires that a man be able to present his side of any cause. He should not be prevented from presenting his side of the cause simply because the prosecutor fails to prove the case initially. The trial court should have granted the motion to dismiss, but since it did not, the defendant had to proceed and attempt to prove his theory of the case in the best manner possible.

The cases decided in the past in Washington indicate that a defendant must "stand" on the motion to dismiss. The law in *State v. Brubaker*, 62 Wn.2d 964, 966, 385 P.2d 318 (1963), and other cases is that if a defendant desires to preserve his motion he can not proceed further. The defendant is forced to make an election. He either waives his motion and goes forward with his evidence or he stands on his motion and is forced to remain silent about any defenses he may have. It is submitted that being forced to remain silent or waive his motion is a violation of petitioner's constitutional rights. It would be a strange criminal trial if a defendant simply gave up his alibi or his self-defense, or whatever other theory of defense he might have so that he could "stand" on his motion to dismiss, made because the prosecuting attorney had not proven the case.

The Washington State Supreme Court did not believe it was able to pass on the assignment of error raised, i.e., "The court erred in not granting appellant's motion to dismiss" because of the rule discussed above. The written decision of the court discusses the prior Washington cases and whether appellant's testimony had bearing on the merits of the case.

The defect in Washington law is not cured simply by the court putting a footnote at the end of the case saying that if they were able to pass on the merits of the case they would rule against the appellant.

CONCLUSION

This petition for a writ of certiorari is being filed because under Washington law, a defendant is forced to make an election which prevents him from due process of law. He must either stand on his motion to dismiss and not testify in his own behalf or he may testify and waive any error he may have under the motion to dismiss. In either case he is giving up a valuable right. It is respectfully requested that certiorari be granted so that the Washington law may be shown to violate the due process clauses of the 5th and 14th amendments.

Respectfully submitted,

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APPENDIX A

[Italics Ours]

[No. 37960. Department Two. July 25, 1968]

THE STATE OF WASHINGTON, *Respondent*, v. DAVIE F. WILSON, *Appellant*.*

[1] Criminal Law—Trial—Taking Case From Jury—Sufficiency of Evidence—Waiver. Any error of the trial court in denying a criminal defendant's motion to dismiss at the close of the state's case is waived by the defendant's subsequent introduction of evidence, unless the evidence he introduces has no bearing on the merits of the cause.

Appeal from a judgment of the Superior Court for King County, No. 45872, Story Birdseye, J., entered June 22, 1967. *Affirmed.*

Prosecution for burglary. Defendant appeals from a conviction and sentence.

Koenigsberg, Brown & Sinsheimer, W. John Sinsheimer, and *Ronald J. Meltzer,* for appellant.

Charles O. Carroll and *Robert G. Maslan,* for respondent.

DONWORTH, J. — Appellant and one Hedges were charged with the crime of burglary in the second degree committed as follows:

> They, the said DAVIE FRANKLIN WILSON and ALBERT DOUGLAS HEDGES, and each of them, in the County of King, State of Washington, on or about the 23rd day of January, 1967, with intent to commit a crime therein, willfully, unlawfully, and feloniously did break and enter a building, said building not owned nor lawfully occupied by said defendants, known as Harmony Apparel Shop, situated at #3 Boston Street, in the City of Seattle, said county and

> state, the same being a building wherein property was then and there kept for sale, used and or deposit; . . . .

After having pleaded not guilty, appellant was tried alone on the foregoing information. The jury returned a verdict of guilty and appellant was sentenced to imprisonment in a state penal institution for a maximum term of 15 years. He has appealed to this court.

In the trial court appellant was represented by counsel other than the attorneys who are representing him on this appeal. Appellant's sole assignment of error is: "The court erred in not granting appellant's motion to dismiss."

In the trial court the basis for his motion to dismiss (made when the state rested) was that the state had presented no evidence that appellant had broken into the Harmony Apparel Shop "with an intent to commit a crime there."

In order to understand the legal problem presented, it is necessary to describe the physical arrangement of the apparel shop and Salady Standard Drugstore which occupy adjoining space in the same store building and also to have in mind the substance of the state's evidence relating to appellant's activities with respect thereto.

In his brief appellant states the substance of the state's evidence as follows:

> The facts as presented by the respondent were as follows: On January 23, 1967, Robert Bishop, a pharmacist, was working the night shift at Salady Standard Drugs located at No. 1 Boston, at the intersection of Boston and Queen Anne Avenue in the City of Seattle. At about 10:55 p.m. that evening,

sometime after the drug store had closed for business Mr. Bishop heard loud noises in the back of the store. As far as he could determine, it was a man and a woman. Those noises ceased and Mr. Bishop then heard rapping noises and men's voices from the same direction. He quickly called the police. Officer Robert E. Fitch was among the officers who answered the call. Officer Fitch positioned himself inside the drug store and he too heard rapping and saw plaster dust falling from the wall. Shortly thereafter, a hole was poked through the wall by someone on the other side. The officer saw the appellant poke his head through this hole, withdraw it, and disappear.

The wall to the drug store had been broken through from the lavatory of the Harmony Apparel Shop at No. 3 Boston, a separate leased premises in the same building.

Sgt. Robert Ammerman of the Seattle police also had answered this call and was waiting outside the building. He heard the noises inside and then observed appellant coming from the building. He placed appellant under arrest and whereupon appellant stated "Don't shoot. You won't have any need for that. I just had to get some narcotics."

The state accepts the foregoing statement as being correct except for the following additions:

The evidence disclosed that the door to the Harmony Apparel Shop had been broken into; that neither the defendant nor the individual charged with him had permission to enter the Harmony Apparel Shop; and that the wall separating the drug store from the apparel shop was broken through.

State's Exhibit 1 is a map which shows the portions of the building occupied by the apparel shop and the drugstore, respectively. There is no door or other means of going from one store to the other without going out of the building.

Appellant's argument in the trial court and in this court is that the charge against him should have been dismissed *because there was no evidence that, assuming that he broke into the apparel shop, he intended to commit a crime therein.* He contended that the only evidence presented by the state in this respect tended to show that he broke into the apparel shop with intent to commit a crime in the drugstore, to wit, steal narcotics.

R.C.W. 9.19.020 defines the crime of burglary in the second degree as follows:

> Second degree. Every person who, *with intent to commit some crime therein shall, under* circumstances not amounting to burglary in the first degree, enter the dwelling house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years.

The state having presented evidence tending to show that appellant had broken into and entered the apparel shop, the burden was upon appellant to produce evidence which convinced the jury that his entry was not made with intent to commit a crime therein. This burden is cast upon him by R.C.W. 9.19.030 which reads as follows:

> Presumption of itent. Every person who shall unlawfully break and enter or unlawfully enter any building or structure enumerated in R.C.W. 9.19.010 and 9.19.020 shall be deemed to have broken and entered or entered the same with intent to commit a crime therein, unless such unlawful breaking and entering or unlawful entry shall be explained by

> testimony satisfactory to the jury to have been made without criminal intent.

The first matter to be considered is the state's contention that by failing to stand on his motion to dismiss made and denied when the state rested its case at the trial and by thereafter testifying in his own behalf, appellant waived his motion to dismiss.

The state in support of its position cites the recent case of *State v. Mudge*, 69 Wn.2d 861, 862, 420 P.2d 863 (1966), in which this court stated the applicable rule[1] as follows:

> At the conclusion of the state's case, the defendant took the stand and testified in his own behalf. This court has held that a motion to dismiss at he end of the state's case is waived when the defendant offers evidence in his own behalf.

In his reply brief appellant argues that he did not waive his motion to dismiss by testifying in his own defense. In support of his position he relies upon *State v. Brown*, 178 Wash. 588, 35 P.2d 99 (1934), in which this court recognized *the existence of the rule but held that it did not apply where the evidence produced by the defendant had no bearing on the merits of the case.*[2]

---

1. Other recent decisions bearing on this problem are *Seattle v. Ruffin*, 74 W.D.2d 15, – P.2d – (1968); *State v. Nelson*, 63 Wn.2d 188, 386 P.2d 142 (1963); *State v. Brubaker*, 62 Wn.2d 964, 385 P.2d 318 (1963); *State v. Goldstein*, 58 Wn.2d 155, 361 P.2d 639 (1961); *State v. Thomas*, 52 Wn.2d 255, 324 P.2d 821 (1958); *State v. Bates*, 52 Wn. 2d 207, 324 P.2d 810 (1958); *State v. Emerson*, 43 Wn.2d 5, 259 P.2d 406 (1953); *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953); *State v. Dildine*, 41 Wn.2d 614, 250 P.2d 951 (1952). *See also* P. Trautman, *Motions Testing The Sufficiency of Evidence*, 42 Wash. L. Rev. 787, 795 (1967), which indicates that *State v. Mudge*, 69 Wn.2d 861, 862, 420 P.2d 863 (1966), correctly states the present rule.

2. *See also State v. Emerson*, 43 Wn.2d 5, 259 P.2d 406 (1953), dissenting opinion.

Appellant contends that his own testimony had no bearing on the merits of the case, and, therefore, the rule referred to in the above-cited case is not applicable to this case. We do not agree.

He testified that he had been drinking at various taverns and bars since about 6 or 7 a.m. on January 23. Late that night he telephoned his ex-wife and asked her to come and get him. She said: "No, take the bus." Appellant then testified on direct examination:

> So, I left the phone booth and I was waiting for the bus, leaning up against the Harmony Apparel Shop, and I stood there for a while and the bus never comes at that time of night. I don't know why. I waited and waited. Eventually I saw a police car pull up. I figured somebody called the police and they will pinch me for being drunk.
>
> The door at that time was open and I slipped inside and sat down and waited. I heard some people making noise. I didn't go back there. I didn't want to get pinched.
>
> I *set* there and I don't know if I fell asleep, but eventually I woke up and there is a policeman with a gun. I walk down there and I said, "I give up. Don't be shooting me."
>
> He put my hands up and shook me down and brought us down to the police station. That's the extent of it, I guess.
>
> Q. Did you go inside of the Harmony Store there with the intent to commit any crime therein? A. Just to get away from the police.

On cross-examination appellant stated that after the telephone call to his ex-wife he was waiting for the bus. He wasn't certain which bus (the police officers testified that they arrived at the location about 11:30 p.m.). He went into the front of the apparel shop. He heard noises

that sounded like a banging in the rear of the store but he did not want to go back and cause any trouble. He was positive that he did not go to the back of the store. He then testified as follows:

> Q. Did this cause you to be suspicious at all? A. No. In my condition I couldn't have been suspicious at all of anything. Q. You were quite inebriated? A. Yes. I have been drunk for seven years. I can't see how in the world they can say I am sober that night. I can't sober up for one night.

Appellant was never asked about the little red Scotch plaid bag which was admitted in evidence as Exhibit 5 (and a photograph thereof as Exhibit 6). The police officers testified that this bag was found against the wall in the lavatory area in the apparel shop. It contained a flashlight (which was turned on), gauze bandages, an inch-wide pry bar, tape, a hatchet, sneakers, vice grips, some keys and a can of Right Guard. These two exhibits were available to the jury in their deliberations. They were also available to the trial court in drawing proper inferences (unfavorable to the moving party) in passing on the motion to dismiss made by appellant when the state first rested.

[1] We have referred to the evidence in some detail because appellant's sole claim of error (to wit, that the trial court erred in denying his motion to dismiss made at the close of the state's case and not renewed thereafter) is based on an exception to the general rule that such a motion was waived by his subsequent introduction of evidence. This exception is recognized where the evidence introduced has no bearing on the merits of the cause.

It is quite apparent that appellant's testimony in this case did have a bearing on the merits of the cause in several material respects. Therefore, *the exception* to the general rule of waiver does not apply to this case. *The general rule of waiver which has been applied in* 10 *of our decisions cited* (*supra*) *is applicable here and thus we are precluded from passing*[3] *upon appellant's assignment of error because it has been waived.*

The judgment and sentence is hereby affirmed.

FINLEY, C. J., HILL, HAMILTON, and NEILL, JJ., concur.

3. Even if we were able to pass upon the assignment of error the result would be the same. The state had made a *prima facie* case of breaking *and entering, and this, when coupled with the statutory presumption supplied by R.C.W. 9.19.030 was sufficient to warrant the denial of appellant's challenge to the sufficiency of the evidence.*

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

1. CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, with out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. APPORTIONMENT OF REPRESENTATIVES IN CONGRESS

Section 2. Representatives shall be apportioned among

the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. Persons Disqualified from Holding Office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. What Public Debts Are Void

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in sup-

pressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. Power to Enforce Article

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.